Supreme Court, U.S.
FILED
NOV 14 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-738

IN RE: PENNHURST PARENTS-STAFF ASSOCIATION

ON APPLICATION FOR A WRIT OF MANDAMUS

MEMORANDUM OF THE UNITED STATES IN OPPOSITION

Petitioner asks this Court for an extraordinary writ of mandamus, contending that the district court has misinterpreted this Court's partial stay issued on June 30, 1980. Alternatively, it seeks a modification of that order. Petitioner has failed to show a sufficient basis for either request.

1. Petitioner sought, pending final disposition of petitions Nos. 79-1404, 79-1408, 79-1414, 79-1415, and 79-1489,[1/] a stay from this Court of aspects of the district court orders pertaining to movement of Pennhurst residents to community placements in accordance with the court of appeals judgment requiring determination of individual needs. A stay of the court of appeals judgment was granted "to the extent that the judgment mandates the movement of residents of the Pennhurst facility to 'appropriate community living arrangements'" (Pet. App. A).

The district court accordingly on July 14, 1980 prohibited the transfer of any Pennhurst resident to a community living

1/ Petitioners here are also petitioners in No. 79-1489.

arrangement "in accordance with prior court orders unless the Hearing Master has determined that such transfer is voluntary" (Pet. App. A). After conducting a hearing and considering the briefs filed by the parties, the district court concluded on July 29, 1980, that no further modification of its earlier orders was necessary (Pet. App. B). Petitioners did not seek review of either the July 14 or the July 29 order here.[2/]

The Hearing Master accordingly continued to review the individual community placement plans for Pennhurst residents. On October 8, 1980, the Master issued a report concerning the placement of P.T., whose parents objected to the placement proposed for him. The Hearing Examiner concluded that (Pet. App. D(b) 15-16):

> Especially since P.T. is an adult and since his parents are not his legal guardians, I do not believe that the objections of his parents * * * must be treated as conclusive [on the issue of voluntariness]. * * * Nonetheless, I do not believe it would be proper for me to disregard entirely the objections of P.T.'s parents * * *. After extensive research and consideration the Hearing Examiner has determined that what he must do in this case is to make a substituted judgment as to what P.T. would choose if he were competent to do so * * *.

Applying this standard, and emphasizing the failure of the County and the Commonwealth to respond adequately to the parents' concerns for P.T.'s safety in the proposed community living arrangement (Pet. App. D(b) 19-22), the Hearing Examiner concluded that the

---

2/ The Commonwealth defendants, petitioners in No. 79-1404, appealed to the court of appeals, but moved that briefing be postponed in light of this petition.

proposed transfer was not voluntary, ordered that the arrangements for the transfer be terminated, and directed the County to work with P.T.'s parents "to resolve their concerns about the proposed placement" (id. at 23).

On October 15, 1980, the Hearing Examiner, applying the same test of voluntariness (Pet. App. D(a) 11-16), determined that G.W.'s proposed placement was voluntary, because his parents' objections to community placement were based on their concern "that they or their other children might be 'embarrassed' if they encountered G.W. in the community * * *."[3/]

In accordance with established procedures (Pet. App. D(a) 24, D(b)30), exceptions to the Hearing Master's reports were filed with the district court (Pet. App. C3). Hearing on those exceptions have been scheduled for November 19-21, 1980. See letter of November 12, 1980 from Judge Broderick to Michael Rodak.

2. The petition should be denied because the district court has faithfully complied with this Court's partial stay order.[4/] The district court's conclusion that this Court's order bars only involuntary transfers out of Pennhurst is supported by the history of the case, the language of the stay order and the background of its issuance.

3/ In this case, too, the Hearing Examiner emphasized that G.W. is also an adult, and his parents are not his legal guardians (Pet. App. D(a) 11).

4/ There is accordingly no need to consider whether review of the district court's order of July 15, 1980, should be accomplished by appeal or through application for issuance of an extraordinary writ. Cf., Baltimore & Ohio Railroad Co. v. United States, 279 U.S. 781, 785 (1929); Vendo Co. v. Lektro-Vend. Corp., 434 U.S. 425 (1978).

On direct appeal, the district court's order requiring the movement of Pennhurst residents to community living arrangements was modified. Instead, the court of appeals required the district court to ascertain the individual needs of Pennhurst residents before ordering them placed in the community. At the time of the stay order the district court had entered an order, pursuant to the court of appeals requirement, establishing a procedure for determining before a Hearing Master whether Pennhurst or a community placement developed by county authorities for a particular retarded person would be more beneficial for that person (Pet. App. B 4).

In seeking to stay the entire process of developing and planning community placements, petitioner asserted that "parent members of the movant Association are being railroaded into placing their children in community facilities that they believe are inadequate to meet the children's needs." (Memorandum in Support (of Motion to Stay Orders of the United States District Court for the Eastern District of Pennsylvania, No. A-1134). Petitioner also sought to preserve the "status quo", but Commonwealth defendants, petitioners in No. 79-1404, did not join in the motion for the stay because they "hoped at that time the bureaucratic structure created by the District Court would promote and not unduly hinder placement efforts" and "feared that a stay might restrain as well [the Common-

wealth's] placement program" (Petitioners Pennhurst State School and Hospital, Memorandum in Support of Petition for Writ of Mandamus and Prohibition, p. 2).

At the July 21, 1980, hearing to ascertain the scope and meaning of the partial stay petitioner, who had sought the stay, argued that it not only removed any compulsion on the Commonwealth and the Counties to move Pennhurst residents to the communities, but prohibited their doing so.[5/] The district court correctly rejected this interpretation; such a broad reading of the stay is not necessary to protect petitioner's concerns that its members' children or wards may be forced into harmful community living arrangments over their objections. Nothing in the stay application suggested that placement in the community of Pennhurst residents who wish such placement would cause irreparable injury to the Commonwealth or the Counties.

It is fundamental that stays by appellate courts of relief ordered by trial courts rest on a demonstration of irreparable injury by the moving party. Although this Court gave no indication of the harm which it sought to prevent by its stay, it was reasonable for the district court to assume

5/ The county officials who had joined the stay motion, and state officials who had not, contended instead that the stay left them with the discretion to place Pennhurst residents in the community as they saw fit, but "removed the authority of [the district court] to exercise any control over such voluntary placements" (Pet. App. B 3). The district court rejected this interpretation on the basis of a comparison of the stay application with this Court's order (Pet. App. B 4).

that the Court meant to give deference to concerns of the moving party - the Parents-Staff Association - concerning possible inappropriate placement of Pennhurst residents. It was equally reasonable to assume that the Court did not mean to prevent state and county officials from developing community alternatives to Pennhurst, where community placement would provide an improved habilitation setting for that individual and would be in accordance with state policy and the wishes of the individual and his guardian. Refusing to allow residents to transfer voluntarily from Pennhurst to more appropriate settings would neither preserve issues for review nor prevent irreparable injury to petitioner; if anything, it would cause irreparable injury to such residents.

The petition for mandamus or prohibition should accordingly be denied.

3. Petitioner alternatively asks this Court to grant the stay which it denied in its June 30, 1980 order -- requiring the dismantling of the district court's procedures for insuring that community placements will be beneficial in fact to the residents of Pennhurst. The Commonwealth joins in this request, not because it opposes movement of Pennhurst residents to other more beneficial habilitation settings, but because it does not wish to pay the expense of judicial oversight of that movement.

Petitioner presents only one new set of facts to this Court --- facts regarding experience under the district court's

order. Petitioner refers to alleged expenses of implementation (Pet. 15) and to seventeen placement hearings, including two in which the parents objected to placement (Pet. App. C).

In one instance the Master overruled the objections and ruled that the proposed transfer of G.W. was voluntary. In the other, the Hearing Examiner concluded that, on the record before him, the placement was not voluntary, and accordingly directed that further efforts to satisfy the parents' objections be undertaken.[6/] The care and deliberate speed reflected in these actions of the Master refute any contention that the district court's order has harmed residents of Pennhurst.

The Commonwealth does not seek to halt community placements. It claims it wants them to continue and asserts it will make them without judicial compulsion. Thus, no infringement of state policies or prerogatives is claimed. No claim is made that any resident has been moved contrary to the judgment of state or county officials or professionals. Instead, the Commonwealth implies that existing judicial oversight of community placements has restrained movement of Pennhurst residents to the community (Pennhurst State School and Hospital Memorandum 2-3).

6/ Petitioner's objections (Pet. 9) to the Hearing Examiner's interpretation of the voluntariness requirement can be presented to the district court in the course of the hearing on the exceptions to the Reports concerning G.W. and P.T. (see supra p. 3). There is no need for this Court to consider those objections on this record.

The position of the Commonwealth on the stay thus parallels its position throughout this case -- Pennhurst residents would benefit by being moved into the community, the Commonwealth intends to proceed with the movement of those residents, but it opposes judicial supervision of that movement. By joining the motion for a stay, the Commonwealth simply seeks to save the costs of the Special Master and the Hearing Master.[7/]

On the other side of the balance, the record showing the effects of confinement of persons to Pennhurst has now been spread before the Court, and discussed in some detail in the briefs. The briefs demonstrate that retention of a person in Pennhurst when a more appropriate community placement, which would enhance the resident's habilitation, is available would harm that person.

Moreover, the detailed reports of the Hearing Master attached to the submission of the Parents-Staff Association

---

7/ The Commonwealth state takes the position that the funds spent could be used for providing services in the communities. The Parents-Staff Association argues that the funds could be used to improve Pennhurst. While expense is obviously a type of harm caused to the state by the extant relief, these assertions cannot be weighed in the balance of harms because they are so incomplete. They do not, for example, furnish the cost of maintaining persons in Pennhurst for comparison purposes; nor is there any showing of how the projected costs of the two Masters compare with past costs; nor do the facts presented include any allocation of the costs of the Special Master to her function of supervising the improvements at Pennhurst, a function which the motion does not seek to stay.

amply demonstrate the need for judicial oversight to protect the interests of Pennhurst residents in proper habilitation (Pet. App. D). In the case of P.T., the community placement was not ordered, primarily because county and Commonwealth officials had failed to respond to the legitimate concerns of the parents. The result was that P.T. will have to remain at Pennhurst for an indefinite time. Perhaps the mediation ordered by the Hearing Master will resolve the issue. Without the Hearing Master, however, it is clear that P.T. would either remain in Pennhurst, or be placed in a community living arrangement which lacks features his parents, at least, believe necessary.[8/]

This report, along with the district court's order of July 14, 1980 (Pet. App. B), highlight the importance of the court's participation in the development of procedures to resolve the conflicting interests that inevitably arise in making a determination of the benefits of particular settings for particular Pennhurst residents. Without them, there would be no resolution, and Pennhurst

8/ The G.W. report, on the other hand, shows a case where considerable efforts were made by county authorities to eliminate features of a community placement to which parents objected, but it became clear that all objection could not be eliminated because the objections were based, not upon factors relevant to G.W.'s welfare, but upon the fear that his parents, or siblings, will be embarrassed by G.W.'s being in their community. Should the Commonwealth and counties acquiesce in such objections, G.W. would suffer harm.

residents would inevitably suffer. There is no showing that the Commonwealth has any plans to perform the function now performed by the district court to protect the interests of the Pennhurst residents. On the contrary, the record shows that the Commonwealth has been reluctant to attempt to resolve differences (Pet. App. D(b)21).

It is therefore respectfully submitted that the petition for a writ of mandamus or for an additional stay should be denied.

WADE H. McCREE
Solicitor General

NOVEMBER 1980